

## UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF IOWA

IN RE: )

LEAH H. CUMBERWORTH, )

Debtors. )

) Chapter 7 JAMES E. CUMBERWORTH, JR. )

) Bankruptcy No. 02-03946

) LEAH H. CUMBERWORTH )

) Adversary No. 03-9020

Plaintiff, )

)

vs. )

) UNITED STATES DEPARTMENT ) OF EDUCATION )

)

Defendant. )

**ORDER RE: COMPLAINT TO DETERMINE DISCHARGE OF DEBT**

This matter came before the undersigned on May 11, 2005 pursuant to assignment. Plaintiff/Debtor Leah Cumberworth was represented by attorney Steven Klesner. Defendant U.S. Department of Education (the "DOE") was represented by attorney Martin McLaughlin. After hearing evidence and arguments of counsel, the Court took the matter under advisement. The time for filing briefs has now passed and this matter is ready for resolution. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

**STATEMENT OF THE CASE**

Debtor seeks a determination that her student loan debt should be discharged as imposing an undue hardship under § 523(a)(8). The United States argues Debtor can repay the student loan under an income contingent repayment plan without undue hardship.

**FINDINGS OF FACT**

Debtor and her husband filed their Chapter 7 petition on November 7, 2002. She filed her complaint in this adversary proceeding on February 7, 2003. Trial was held August 25, 2004. The parties subsequently requested and received extensions of time to file briefs or to continue negotiations. In December 2004, Debtor moved to reopen the record due to a change in her husband's health and finances. After an additional continuance, final hearing was held on May 11, 2005.

At the final hearing, Debtor's husband, James Cumberworth, testified regarding the service connected compensation he receives from the Veteran's Administration. Mr. Cumberworth also receives Social Security disability payments. He has post-traumatic stress disorder ("PTSD") stemming from combat service in Viet Nam. He has had both hips and one knee replaced, had quadruple bypass heart surgery, has problems with his spine and recently started feeding by a tube because of esophageal problems.

The V.A. has now ruled Mr. Cumberworth incompetent to manage his own finances and appointed Gregory Epping, a local attorney, as Mr. Cumberworth's V.A. Federal Fiduciary. Under this type of appointment, the fiduciary manages the veteran's income and pays his expenses. Mr. Cumberworth testified that the

finding that he was incompetent arose after a psychiatric visit in December in which he disclosed that he has periods of time during which he is manic and irresponsible with money.

He has been diagnosed with bipolar disorder as a result of his combat-related PTSD.

At the time of the initial trial herein, Debtor was 58 years old and her husband was 59 years old. They testified regarding their income and expenses, listed on Exhibit 1.

Debtor has income from social security disability payments and her FERS pension. Prior to becoming disabled, Debtor worked at the V.A. hospital as a nurse. Debtor's disability arose from stenosis of the spine and she was determined to be disabled in 2001. Her total monthly income is \$2,145. Mr. Cumberworth's monthly income from his VA compensation is \$2,371 and social security disability payments are \$426, after garnishment for child support of \$485 per month. Debtors were married in May 2000.

The family's expenses have decreased since the filing of their bankruptcy petition, as indicated on Exhibit 1. They disclose disposable income of \$137.50 per month. At the most recent hearing, Mr. Cumberworth testified that postpetition

loan payments of \$156 and support he paid to his children of \$500 per month have ceased. This increases the couple's total disposable income. If the monthly expenses are divided equally between these two Debtors and each paid half from their individual income, Mrs. Cumberworth would have \$71 per month disposable income and Mr. Cumberworth would have \$722 per month.

Debtor received a 3-year nursing certificate in 1965. In the early 1980's, she began attending the University of Iowa to get a bachelor's degree and subsequently she attained a master's degree in journalism. In 1990, Debtor returned to college and earned a master's degree in nursing. In 1989, Debtor consolidated her outstanding student loan debts which, at the time, totaled \$22,168. She incurred additional student loans while working on her master's degree. The parties have agreed that, as of March 4, 2003, the total balance owed, including fees and interest, was \$64,233.39.

Debtor made payments toward her student loans for several years. Between 1994 and 1997, Debtor believes \$14,400 was paid through a debt management program she was in, but this amount has not been verified. Debtor also made payments of \$208 per month under an agreement with the DOE between 1997 and 2001. This portion of Debtor's payment history is documented in her Exhibit 7. Debtor testified that she stopped making payments when the DOE stopped sending her statements in January 2001. Debtor has not made any further payments except one payment of \$750 in January 2002.

Debtor received a letter from the DOE in March 2001 stating she was placed on billing for \$580 per month. There were further communications back and forth between the DOE and Debtor or her husband. Debtor and Mr. Cumberworth testified that they sent all the information requested by the DOE to try to get the monthly payments reduced. No resolution was reached. Debtor also testified she spoke to a DOE representative about seeking a disability discharge of the debt but was told she was not eligible.

Debtor testified that she received communications by mail and phone from entities other than the DOE attempting to collect on the debt. She stated that

these contacts gave her varying information, including different amounts which were claimed owing. Debtor testified that as she was not receiving regular statements, she did not send any more payments, not knowing where they should be sent or if they would be properly credited.

### CONCLUSIONS OF LAW

Debtor seeks a determination that excepting her student loan obligations from discharge would impose an "undue hardship" within the meaning of 11 U.S.C. § 523(a)(8).

Student loan debts are not discharged in bankruptcy "unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8). Debtor must prove the existence of undue hardship by a preponderance of the evidence. In re Cheney, 280 B.R. 648, 659 (N.D. Iowa 2002).

### UNDUE HARDSHIP

"Undue hardship" is not defined by the Bankruptcy Code. To determine whether undue hardship exists, the Eighth Circuit has established a "totality of the circumstances" test. In re Long, 322 F.3d 549, 553 (8th Cir. 2003) (rejecting the Brunner test as too restrictive and adopting the Andrews test); In re Andrews, 661 F.2d 702 (8th Cir. 1981). The 8th Circuit held in Long that:

[i]n evaluating the totality-of-the-circumstances, our bankruptcy . . . courts should consider: (1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case. Simply put, if the debtor's reasonable future financial resources will sufficiently cover payment of the student loan debt--while still allowing for a minimal standard of living--then the debt should not be discharged. Certainly, this determination will require a special consideration of the debtor's present employment and financial situation--including assets, expenses, and earnings--along with the prospect of future changes--positive or adverse--in the debtor's financial position.

Long, 322 F.3d at 554 (citations omitted). The Court is required to apply § 523(a)(8) and the "Andrews test" to each

of the debtor's student loans separately. In re Andresen, 232 B.R. 127, 137 (B.A.P. 8th Cir. 1999) (affirming decision that the discharge operated on two of the debtor's three individual student loans by reason of the undue hardship provision of § 523(a)(8)). The Court does not have the power to rewrite student loans to allow partial discharge or to restructure payments. In re Hawkins, 187 B.R. 294, 301 (Bankr. N.D. Iowa 1995).

Debtor's total living expenses should not exceed what is reasonable and necessary. In re Long, 292 B.R. 635, 638 (B.A.P. 8th Cir. 2003) (on remand from 8th Circuit). To be reasonable and necessary, expenses must be modest and commensurate with the debtor's resources. In re Schulstadt, 322 B.R. 863, 867 (Bankr. N.D. Iowa 2005). Provided that total expenses remain minimal, the debtor is not expected or required to implement every conceivable cost-saving measure. Id. at 5. The fact that the household income may not be at

or below poverty guidelines does not preclude a finding of undue hardship. In re Limkemann, 314 B.R. 190, 195 (Bankr. N.D. Iowa 2004). Courts generally consider a spouse's income and view undue hardship in light of the total income of the family. In re Sweeney, 304 B.R. 360, 363 (D. Neb. 2002).

In addition, the Court examines other relevant factors and circumstances of each individual bankruptcy case. These may include: (1) the debtor's good faith effort to repay the loan, or a debtor's bad faith in non-repayment, (2) whether the debtor has made a good faith effort to obtain employment, maximize income, and minimize expenses, and (3) whether the debtor is suffering truly severe, even uniquely difficult financial circumstances, not merely severe financial difficulty. Faktor v. United States, 306 B.R. 256, 264 (Bankr. N.D. Iowa 2004); In re Wilson, 270 B.R. 290, 294 (Bankr. N.D. Iowa 2001). A good faith inquiry may include whether the debtors caused their own financial condition. Faktor, 306 B.R. at 264.

It is appropriate to consider a debtor's disease or disability as a factor in the determination of undue hardship because [it] may effect an individual's ability to work." In re Ford, 269 B.R. 673, 675 (B.A.P. 8th Cir. 2001). Having a disabled spouse or dependents may necessitate a greater commitment of time and money while limiting the debtor's financial wherewithal. In re Ford, 269 B.R. 673, 676 (B.A.P. 8th Cir. 2001). The debtor's student loan repayment history is relevant to show the debtor's past commitment and ability to repay in light of the debtor's financial circumstances. In re Mulherin, 297 B.R. 559, 565 (Bankr. N.D. Iowa 2003).

The legislative history behind the exception to discharge for student loans reveals that Congress sought to close a perceived loophole in the student loan program. This loophole allowed students to "escape their student loan obligations by filing bankruptcy on the eve of a lucrative career." In re Andresen, 232 B.R. 127, 130 (B.A.P. 8th Cir. 1999).

### ANALYSIS

Debtor has made an effort to repay her student loans. She became frustrated with her inability to work out an acceptable payment plan after the DOE changed Debtor's monthly billings from \$208 to \$580 per month. Debtor has made attempts to pay her student loan and is seeking to have it discharged.

This is not a case whether the debtor is attempting to escape student loan obligations on the eve of a lucrative career. Rather, Debtor's career is over because of her disability. The Court calculates that a payment of \$580 per month on the \$64,233 remaining unpaid would require more than 12 years of payments to fully satisfy the debt.

Debtor and her husband are both disabled and over 58 years old. Their income, however, is not insubstantial as both of them receive disability and/or pension payments. Their combined gross monthly income is almost \$5,000, or \$60,000 per year. From Debtors' reported expenses, they appear to be living within their means. Their expenses are not unreasonable given their circumstances. Some of their spending is discretionary, e.g. \$260 for recreation/entertainment, \$100 support for Debtor's grandchildren, and

\$120 charitable donations. Together, Debtors currently appear to have disposable income of \$793, based on Exhibit 1 and Mr. Cumberworth's most recent testimony regarding the postpetition loan and support of children expenses ending.

Debtors' situation is unusual in that Mr. Cumberworth's income is currently being administered by a fiduciary. From the testimony, it appears his fiduciary will disburse funds for Mr. Cumberworth's necessities, i.e. housing, utilities, phone, food, etc. The fiduciary does not have the ability to disburse funds for expenses which do not benefit Mr. Cumberworth. It is highly unlikely the V.A. would approve payment of Debtor's student loans from Mr. Cumberworth's income. However, his income will be available to pay his portion of the couple's monthly expenses.

This is a unique situation. Mr. Cumberworth's income is not available to pay for Mrs. Cumberworth's debts. Mrs. Cumberworth's income alone is insufficient to make significant monthly payments on the student loan debt. If half of the couple's monthly expenses are delineated as Mrs. Cumberworth's sole responsibility, she has merely \$71 per month disposable income. Even if Mr. Cumberworth's fiduciary would agree to pay more than half of the couple's monthly expenses on his behalf, Mrs. Cumberworth would be unable to make sufficient payments to pay off the student loan debt in a reasonable amount of time.

Debtor has attempted to pay toward the loan in good faith for a number of years. This adversary proceeding has been on file for more than two years, and the parties have failed to reach a solution. Based upon the totality of the circumstances, the Court concludes that excepting this debt from discharge will cause Debtor and her husband undue hardship.

**WHEREFORE,** Debtor's Complaint to Determine Discharge of Debt is GRANTED.

**FURTHER,** Debtor Leah Cumberworth's student loan debt owed to the U.S. Department of Education is discharged.

DATED AND ENTERED:

June 7, 2005

PAUL J. KILBURG  
CHIEF BANKRUPTCY JUDGE